

## CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Casey McCann	Team: Squad #14	CCRB Case #: 201910288	<input type="checkbox"/> Force	<input type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Wednesday, 11/20/2019 11:10 PM, NA, 11/___/2019 8:00 PM	Location of Incident: 1st Avenue between Paladino Avenue and East 124th Street; 25th Precinct stationhouse	Precinct: 25	18 Mo. SOL 5/20/2021	EO SOL 1/4/2022	
Date/Time CV Reported Wed, 11/27/2019 10:58 AM	CV Reported At: CCRB	How CV Reported: Phone	Date/Time Received at CCRB Wed, 11/27/2019 10:58 AM		

Complainant/Victim	Type	Home Address

Subject Officer(s)	Shield	TaxID	Command
1. POM Hector Figueroa	16620	955915	033 PCT
2. An officer			025 PCT

Witness Officer(s)	Shield No	Tax No	Cmd Name
1. POM Nairobi Grayson	18162	958652	PBMN SU
2. LT Taiyuen Lee	00000	948233	PBMN SU

Officer(s)	Allegation	Investigator Recommendation
A.POM Hector Figueroa	Abuse: On November 20, 2019, on 1st Avenue between Paladino Avenue and East 124th Street in Manhattan, Police Officer Hector Figueroa frisked § 87(2)(b)	
B.POM Hector Figueroa	Abuse: On November 20, 2019, on 1st Avenue between Paladino Aveue and East 124th Street in Manhattan, Police Officer Hector Figueroa searched § 87(2)(b)	
C.POM Hector Figueroa	Abuse: On November 20, 2019, on 1st Avenue between Paladino Avenue and East 124th Street in Manhattan, Police Officer Hector Figueroa strip-searched § 87(2)(b)	
D.POM Hector Figueroa	Abuse: On November 20, 2019, on 1st Avenue between Paladino Avenue and East 124th Street in Manhattan, Police Officer Hector Figueroa searched the vehicle in which § 87(2)(b) was an occupant.	
E. An officer	Abuse: On an unknown date between November 21, 2019 and November 23, 2019, at the 25th Precinct stationhouse in Manhattan, an officer did not process § 87(2)(b)'s complaint regarding an officer.	

### Case Summary

On November 27, 2019, § 87(2)(b) filed this complaint with the CCRB via telephone.

On November 20, 2019, in the vicinity of 1<sup>st</sup> Avenue between Paladino Avenue and East 124<sup>th</sup> Street in Manhattan, Police Officer Hector Figueroa, Lieutenant Tai Yuen Lee, and Police Officer Nairobi Grayson, all of Patrol Borough Manhattan North Anti-Crime, pulled over § 87(2)(b)'s vehicle. PO Figueroa frisked and searched § 87(2)(b) (**Allegations A and B: Abuse of Authority, § 87(2)(g)**). PO Figueroa allegedly strip-searched § 87(2)(b) (**Allegation C: Abuse of Authority, § 87(2)(g)**). PO Figueroa searched § 87(2)(b)'s vehicle (**Allegation D: Abuse of Authority, § 87(2)(g)**).

On an unknown date between November 21, 2019, and November 23, 2019, at the 25<sup>th</sup> Precinct stationhouse in Manhattan, an officer did not process § 87(2)(b)'s complaint regarding an officer (**Allegation E: Abuse of Authority, § 87(2)(g)**).

PO Figueroa issued § 87(2)(b) a summons for an indistinctive license plate, which was insecure/dirty (BR 01).

Body-worn camera footage from the incident on November 20, 2019 was received and will be discussed in further detail below.

### Findings and Recommendations

**Allegation (A) Abuse of Authority: On 1<sup>st</sup> Avenue between Paladino Avenue and East 124<sup>th</sup> Street in Manhattan, Police Officer Hector Figueroa frisked § 87(2)(b)**

**Allegation (B) Abuse of Authority: On 1<sup>st</sup> Avenue between Paladino Avenue and East 124<sup>th</sup> Street in Manhattan, Police Officer Hector Figueroa searched § 87(2)(b)**

The investigation established the following facts:

On November 20, 2019, at approximately 11:10 p.m., § 87(2)(b) was driving alone in his black 2009 Infiniti XF-50 SUV, which had tinted windows and a temporary paper New Jersey license plate, on 1<sup>st</sup> Avenue in Manhattan when PO Figueroa, Lieutenant Lee, and PO Grayson pulled § 87(2)(b) over. PO Figueroa approached the driver's side of § 87(2)(b)'s vehicle and asked for his license, registration, and insurance, which § 87(2)(b) provided. While inside his vehicle, § 87(2)(b) offered consent, unprompted, for PO Figueroa to search his vehicle. When § 87(2)(b) stepped out of the vehicle per PO Figueroa's instruction, PO Figueroa frisked and searched § 87(2)(b). PO Figueroa then searched § 87(2)(b)'s vehicle, pursuant to § 87(2)(b)'s consent, and issued him a summons for having an indistinctive license plate, which was insecure/dirty.

§ 87(2)(b) (BR 02) testified that after he provided PO Figueroa with his documents, PO Figueroa briefly stepped away from § 87(2)(b)'s vehicle. Upon PO Figueroa's return, PO Figueroa asked § 87(2)(b) to step out of the vehicle because he saw "something that looked like marijuana" inside the vehicle. § 87(2)(b) asked PO Figueroa where he saw the marijuana, but PO Figueroa did not respond, and § 87(2)(b) told PO Figueroa that he did not smoke marijuana. When § 87(2)(b) exited the vehicle, PO Figueroa patted § 87(2)(b)'s body from his shoulders to his feet. After PO Figueroa completed the frisk, PO Figueroa then ran his thumb between the waistband of § 87(2)(b)'s track pants and his body.

PO Figueroa's body-worn camera footage (BR 03-04) depicts § 87(2)(b) exit his vehicle and put his hands on top of the car, as per PO Figueroa's instruction. PO Figueroa outstretches his arms and makes contact with § 87(2)(b)'s shoulder area. The camera then goes black due to PO Figueroa's proximity to § 87(2)(b) so it is not clear what PO Figueroa or § 87(2)(b) are doing. PO Figueroa says, "You got some weed near the window? When is the last time you smoked in the car? Anybody smoking in here with you?" and tells § 87(2)(b) that he has weed near the door handle (<<03:46 - 04:16>>).

PO Grayson's body-worn camera footage (BR 05-06) also depicts § 87(2)(b) exit his vehicle. PO Grayson is standing near the back-driver's side of § 87(2)(b)'s vehicle. PO Figueroa frisks § 87(2)(b) beginning at § 87(2)(b)'s shoulders, and moves his right hand into § 87(2)(b).

§ 87(2)(b)'s jacket pocket. PO Figueroa asks § 87(2)(b) when the last time he smoked in the car was, but § 87(2)(b) denies smoking weed. PO Figueroa briefly hooks his right thumb near the front right side of § 87(2)(b)'s waistband and moves his thumb back toward the right side of § 87(2)(b)'s waistband (<<03:32 – 04:25>>).

PO Figueroa (BR 07) testified that he observed § 87(2)(b)'s license plate with a frame around it and thus he initiated a car stop. PO Figueroa did not remember smelling an odor of marijuana emanating from § 87(2)(b)'s vehicle and did not remember any other officer stating they smelled marijuana. Because § 87(2)(b) offered consent to search the vehicle § 87(2)(g), PO Figueroa asked § 87(2)(b) to step out of the vehicle. PO Figueroa stood behind § 87(2)(b) and frisked him from his shoulders to his feet as § 87(2)(b) was going to be standing at the back of the vehicle while PO Figueroa searched it and thus he wanted to ensure that § 87(2)(b) did not have any weapons. PO Figueroa did not remember running his finger between § 87(2)(b)'s waistband and his skin, though he usually touches the top of an individual's waistband or belt during a frisk. PO Figueroa had no recollection of touching § 87(2)(b)'s skin in particular.

After PO Figueroa reviewed his body-worn camera footage, PO Figueroa recalled seeing a small amount of "shake," described as leftover marijuana from rolling a marijuana cigarette, in the tray below the door handle when § 87(2)(b) opened the door. PO Figueroa still did not remember if he smelled marijuana. PO Figueroa frisked § 87(2)(b) because now that § 87(2)(b) had "narcotics," he further wanted to ensure § 87(2)(b) did not have any weapons on his person.

Lieutenant Lee (BR 08) testified that when he and PO Figueroa went to the driver's side of § 87(2)(b)'s vehicle, Lieutenant Lee smelled an odor of marijuana emanating from the vehicle, though he did not see any marijuana in plain view. Due to the odor of marijuana, PO Figueroa asked § 87(2)(b) to exit the vehicle and proceeded to frisk § 87(2)(b) though Lieutenant Lee could not see exactly where PO Figueroa frisked § 87(2)(b). Lieutenant Lee did not see PO Figueroa enter any of § 87(2)(b)'s pockets.

Per *People v. Chestnut* 43 A.D.2d 260 (1974) (BR 09), the smell of marijuana smoke, with nothing more, is sufficient to provide police officers with probable cause to search a vehicle and its occupants. § 87(2)(g)

§ 87(2)(b)

§ 87(2)(b)

§ 87(2)(b)

**Allegation (C) Abuse of Authority: On 1<sup>st</sup> Avenue between Paladino Avenue and East 124<sup>th</sup> Street in Manhattan, Police Officer Hector Figueroa strip-searched § 87(2)(b)**

§ 87(2)(b) testified that after PO Figueroa frisked him, PO Figueroa stood behind § 87(2)(b) pulled § 87(2)(b)'s waistband away from his body, and pulled his pants down approximately two to three inches, exposing the top of § 87(2)(b)'s buttocks, as § 87(2)(b) was not wearing underwear. PO Figueroa put his flashlight into § 87(2)(b)'s pants and shined it, but did not touch § 87(2)(b)'s buttocks. PO Figueroa then released § 87(2)(b)'s waistband so that it was back around § 87(2)(b)'s body.

PO Figueroa did not remember pulling § 87(2)(b)'s waistband away from § 87(2)(b)'s body, lowering § 87(2)(b)'s pants, exposing his buttocks, and shining a flashlight into § 87(2)(b)'s pants.

Lieutenant Lee, who was on the driver's side of § 87(2)(b)'s vehicle with PO Figueroa and § 87(2)(b) did not see PO Figueroa lower § 87(2)(b)'s pants, expose his buttocks, and shine a flashlight into his pants.

As mentioned in Allegations A and B, in PO Figueroa's body-worn camera footage, while he frisks § 87(2)(b) his camera goes black from his proximity to § 87(2)(b) and thus his actions are not visible.

PO Grayson's body-worn camera, however, does capture the entirety of PO Figueroa's

interaction with § 87(2)(b) at the driver's side of § 87(2)(b)'s vehicle. At no point does PO Figueroa pull back § 87(2)(b)'s waistband, lower § 87(2)(b)'s pants, or shine a flashlight into § 87(2)(b)'s pants (<<03:31 – 04:26>>).

§ 87(2)(g)

**Allegation (D) Abuse of Authority: On 1<sup>st</sup> Avenue between Paladino Avenue and East 124<sup>th</sup> Street in Manhattan, Police Officer Hector Figueroa searched the vehicle in which § 87(2)(b) was an occupant.**

It is undisputed that § 87(2)(b) offered consent, unprompted, for PO Figueroa to search his vehicle and that PO Figueroa ultimately searched § 87(2)(b)'s vehicle.

§ 87(2)(b) testified that after he provided PO Figueroa with his documents, PO Figueroa asked § 87(2)(b) where he bought the car and whom he bought it from. § 87(2)(b) explained to PO Figueroa that the car belonged to him, but he had not registered it yet. § 87(2)(b) told PO Figueroa, "You can search the car if you feel uncomfortable," and moved his hand toward the seatbelt buckle so that he could exit the car. PO § 87(2)(b) said, "Don't do that. Just relax." Once § 87(2)(b) exited his vehicle and stood at the back of it, he saw PO § 87(2)(b) look into the glove box, back seat, and trunk of his vehicle, which is a hatchback.

PO Figueroa's body-worn camera footage is consistent with § 87(2)(b)'s testimony, in that PO Figueroa asks § 87(2)(b) questions about his vehicle, including where and when he bought the vehicle. § 87(2)(b) explains that his license plate is valid (<<01:41 – 03:15>>). § 87(2)(b) states, "You want to search the car?" to which PO Figueroa responds, "We'll get there. Relax" (<<03:18 – 03:22>>). After § 87(2)(b) exits the car, PO Figueroa searches the car near the driver's side door and middle console, front and back passenger's seat, and the trunk (<<04:47 – 09:17>>).

PO Figueroa similarly testified that after § 87(2)(b) provided his documents, § 87(2)(b) said, "You wanna search the car?" without PO Figueroa mentioning anything about searching § 87(2)(b)'s vehicle. While § 87(2)(b) was at the back of his vehicle with other officers, PO Figueroa searched § 87(2)(b)'s vehicle "wherever § 87(2)(b) could stuff a weapon," though PO Figueroa did not remember exactly where he looked in the car. PO Figueroa searched § 87(2)(b)'s vehicle for approximately two minutes.

Lieutenant Lee testified that PO Figueroa searched § 87(2)(b)'s vehicle for approximately five minutes. Lieutenant Lee did not recall if § 87(2)(b) verbally consented to his vehicle being searched, but because of the odor of marijuana, consent was not necessary.

Consent is voluntary when it is a true act of the will, an unequivocal product of an essentially free and unconstrained choice. Voluntariness is incompatible with official coercion, actual or implicit, overt or subtle. People v. Gonzalez 39 N.Y.2d 122 (1976) (BR 10).

A factor for the court's consideration in determining whether consent was present includes the manner itself in which the consent occurred, that is, a reluctant, limited consent or a self-prompted spontaneous consent. People v. Capraella 165 Misc. 2d 639 (1995) (BR 18).

§ 87(2)(g)

**Allegation (E) Abuse of Authority: On an unknown date between November 21, 2019 and November 23, 2019, at the 25<sup>th</sup> Precinct stationhouse in Manhattan, an officer did not process § 87(2)(b)'s complaint regarding an officer.**

§ 87(2)(b) testified that approximately two to three days after PO Figueroa pulled him over, § 87(2)(b) went to a stationhouse near the Taino Towers in East Harlem at approximately 8

p.m. or 9 p.m. to get a CCRB form. § 87(2)(b) spoke with a uniformed officer, described as a Hispanic male, 5'10", approximately 200 pounds, and approximately in his 30s, who was sitting behind a barn door at the stationhouse, and asked for a CCRB form. The officer told § 87(2)(b) that he did not have any more CCRB forms and provided § 87(2)(b) with the CCRB's telephone number.

The investigation determined that § 87(2)(b) likely went to the 25<sup>th</sup> Precinct stationhouse in Manhattan to file his complaint, as the Taino Towers are located on East 122<sup>nd</sup> Street and the 25<sup>th</sup> Precinct stationhouse is located on East 119<sup>th</sup> Street in Manhattan. As such, Roll Calls from Tour 3 on November 22, 2019 and November 23, 2019 were requested.

According to the Tour 3 Roll Call from November 22, 2019 (BR 11), Police Officer Marc Brigantti was assigned as the telephone switchboard (t/s) operator and Sergeant Kaeron David was assigned as the desk sergeant. As PO Brigantti is a Hispanic male and Sgt. David is a black male, PO Brigantti was interviewed as he more closely matched the physical description § 87(2)(b) provided.

PO Brigantti (BR 17) had no recollection of interacting with § 87(2)(b) and did not remember refusing to process § 87(2)(b)'s complaint at the stationhouse.

According to the Tour 3 Roll Call from November 23, 2019 (BR 12), Sergeant Brian Klarman was listed as the desk sergeant and matched the description § 87(2)(b) provided, as Sgt. Klarman is a Hispanic male and is 5'10". As such, Sgt. Klarman was interviewed.

Similarly to PO Brigantti, Sgt. Klarman (BR 13) had no recollection of interacting with § 87(2)(b) and did not recall refusing to process § 87(2)(b)'s complaint at the stationhouse providing him with the CCRB's telephone number instead.

§ 87(2)(g)

#### **Civilian and Officer CCRB Histories**

- This is the first complaint to which § 87(2)(b) has been a subject (BR 14).
- PO Figueroa has been a member of service for seven years and has been named a subject in five cases and 12 allegations, one of which was substantiated:
  - 201702181 involved a substantiated allegation of a vehicle search. The Board recommended command level instructions and the NYPD did not impose discipline.
  - § 87(2)(g)

#### **Mediation, Civil and Criminal Histories**

- § 87(2)(b) declined to mediate this complaint.
- As of March 4, 2020, the Office of the New York City Comptroller has no record of a Notice of Claim being filed in regard to this incident (BR 15).
- § 87(2)(b)

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Squad No.: 14

Investigator:	<u>Casey McCann</u>	<u>Inv. Casey McCann</u>	<u>07/19/2021</u>
	Signature	Print Title & Name	Date

Squad Leader:	<u></u>	<u></u>	<u></u>
	Signature	Print Title & Name	Date